IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

WEDNESDAY, THE 20TH DECEMBER 2006 / 29TH AGRAHAYANA 1928

WP(C).No. 17897 of 2006(R)

PETITIONER:

SRI. THOMAS P. JOSEPH,
DISTRICT & SESSIONS JUDGE, KOZHIKODE.

BY ADV. SRI.BECHU KURIAN THOMAS
SRI.PRAKASH PUTHIADAM
SRI.PAUL JACOB (P)
SRI.ROSHEN.D.ALEXANDER
SRI.NAVEEN CHERIAN

RESPONDENTS:

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1. HIGH COURT OF KERALA,
ERNAKULAM, REPRESENTED BY ITS REGISTRAR.
(SUBORDINATE JUDICIARY).

2. S.SAINUDEEN,
LAW SECRETARY, (ON DEPUTATION)
GOVT. SECRETARIAT, THIRUVANANTHAPURAM.

3. M.L.JOSEPH FRANCIS,
(SELECTION GRADE DISTRICT JUDGE)
DISTRICT & SESSIONS JUDGE, THRISSUR.

R2 BY ADV. SRI.KRB.KAIMAL
SRI.ANIL K.NAIR
SRI.B.UNNIKRISHNA KAIMAL
SRI.V.MADHUSUDHANAN
R3 BY ADV. SRI.V.V.SIDHARTHAN
SRI.ELDHOSE M.VARGHESE
R1 BY ADV. SRI.O.V.RADHAKRISHNAN (SR.)
SMT.K.RADHAMANI AMMA
SRI.ANTONY MUKKATH
SRI.K.V.JOY
SRI.K.RAMACHANDRAN (THYKOODAM)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 20/12/2006, ALONG WITH WPC NO. 18004 OF 2006 & WPC NO. 18608 OF 2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

P1: TRUE COPY OF THE KERALA STATE HIGHER JUDICIAL SERVICES SPECIAL RULES 1961.

P2: TRUE COPY OF THE GOVERNMENT ORDER G.O.(MS) NO.231/01/HOME DT.12.12.2001.

P3: TRUE COPY OF THE ORDER OF THE HON'BLE HIGH COURT OF KERALA DT.1.9.2004 NUMBERED AS B1/41625/2002.

P4: TRUE COPY OF THE ORDER OF THE 1ST RESPONDENT DT.2.11.2004.

P5: TRUE COPY OF THE ORDER OF THE 1ST RESPONDENT DT.20.4.2005.

P6: TRUE COPY OF THE ORDER DT.6.1.2006 NUMBERED AS B1-41625/2002.

P7: TRUE COPY OF THE REPRESENTATION DT.30.1.2006 SUBMITTED BY THE PETITIONER TO 1ST RESPONDENT.

P8: TRUE COPY OF THE ORDER DT.19.6.2006 ISSUED BY 1ST RESPONDENT.

RESPONDENT'S EXHIBITS:

R1(a): PHOTOCOPY OF THE ORDER NO.B1-37/92 DT.31.3.1992 OF THE 1ST RESPONDENT.

R1(b): PHOTOCOPY OF THE SENIORITY LIST OF DISTRICT JUDGES AS ON 1.7.1992.

R1(c): PHOTOCOPY OF THE ORDER NO.B1-40517/2000 DT.12.7.2001 OF 1ST RESPONDENT.

R1(d): PHOTOCOPY OF THE PROCEEDINGS DT.18L.12.2003 OF THE 1ST RESPONDENT.

R1(e): PHOTOCOPY OF THE MINUTES OF THE ADMINISTRATIVE COMMITTEE OF THE HIGH COURT HELD ON 14.6.2004.

R1(f): .DO. .DO. HELD ON 9.8.2004.

R1(g): PHOTOCOPY OF THE MINUTES OF THE FULL COURT MEETING HELD ON 19.8.2004.

R2(a): TRUE COPY OF THE LETTER NO.DO.NO.R.1/2004(SS) DT.8.7.2005 OF THE 1ST RESPONDENT TO THE 2ND RESPONDENT.

R3(a): TRUE COPY OF THE LETTER NO.D.O.R1/2005/SS DT.1.6.2005 ISSUED BY THE REGISTRAR OF THE 1ST RESPONDENT TO THE 3RD RESPONDENT.

TRUE COPY

P.A. TO JUDGE

C.N.RAMACHANDRAN NAIR,J.

W.P.C. NOs. 17897, 18004, & 18608 OF 2006

Dated this the 20th day of December, 2006

JUDGMENT

Petitioners in the three connected WPCs. are holding various posts in the State Higher Judiciary in the cadre of Super Time Scale District Judges. Their dates of entry into service, promotion as Selection Grade District Judges and further promotion as Super Time Scale District Judges are given below:

Name	District Judge	Selection Grade DJ	Super Time Scale DJ
Thomas P. Joseph	2.4.1992	3.7.2000	13.10.2004
P. Bhavadasan	2.4.1992	12.7.2000	14.10.2004
Satheeshachandran	1.6.1992	12.7.2000	28.10.2004

The last promotions given to petitioners vide proceedings dated 2.11.2004 is produced in WPC 17897 of 2006 as Ext.P4. Even though respondents 2 and 3 were seniors to petitioners in the cadre of Selection Grade District Judges, while issuing Ext.P4 promoting petitioners as Super Time Scale District Judges, respondents 2 and 3

were then denied promotion to that cadre on account of adverse remarks in their confidential reports. However, later the adverse remarks about respondents 2 and 3 in their confidential reports were expunged and based on the same, the High Court retrospectively promoted them to the cadre of Super Time Scale District Judges vide Ext.P6 dated 6.1.2006 overlooking the seniority of petitioners who were in that cadre for more than a year before respondents 2 and 3 were promoted. Even though petitioners filed representations against reversal of their seniority on account of retrospective promotion given to respondents 2 and 3 in the cadre of Super Time Scale District Judges, the same was rejected by the High Court vide Ext.P8. These Writ Petitions are accordingly filed challenging the retrospective promotion given to respondents 2 and 3 vide Ext.P6 which is confirmed by Ext.P8.

2. I have heard counsel appearing for the petitioners, for the High Court and for the contesting respondents. Parties and documents referred herein are those in WPC 17897 of 2006. Detailed counter affidavits are filed by all the respondents and copies of service records

pertaining to confidential reports of respondents 2 and 3 were furnished by the High Court and I have perused the same.

3. Before proceeding to consider the controversy in this case, I have to necessarily refer to the Rules and orders based on which promotions are made to the cadre of Super Time Scale District Judges. So far, Kerala State Higher Judicial Service (Special Rules) 1961 are not amended incorporating provision for appointment of Super Time Scale District Judges. However, based on Shetty Commission Report and the Supreme Court Judgment, Government issued Ext.P2 order on 12.12.2001 creating the post of Super Time Scale District Judges and fixed their strength in the State service at 10 per cent of the strength of the Selection Grade District Judges. Selections have to be made from among Selection Grade District Judges based on merit-cum-seniority. The first selection to the cadre of Super Time Scale District Judges was made by the High Court pursuant to Ext.P2 order of the Government vide Ext.P3 which again is based on Ext.R1(e) decision of the Administrative Committee consisting of Chief Justice and senior most Judges of the High Court. It is seen from Ext. R1(e) that the

Administrative Committee in their meeting held on 14.6.2004 considered 37 persons both retired and serving, for promotion to the post of Super Time Scale District Judges and second respondent figures at Sl.No. 36 in the said list. The Committee's decision is the following:

> After considering their confidential records and their merit, the Committee is of the opinion that the above mentioned 37 officers, except Sl.No.10, Shri. P. Ramachandran Nair, Sl.No. 22, Sri. P. Thankappan and Sl.No. 36, Sri. S. Sainudeen, be granted Super Time pay scale.
>
> Also resolved that Sl.No.10, Sri. P. Ramachandran Nair and Sl.No. 22, Sri. P. Thankappan are not fit and suitable for promotion to the cadre of Super time Scale District Judges.
>
> Further resolved to defer the case of Sl.No. 36, Sri. S. Sainudeen.

Based on the above decision, Ext.P3 was issued wherein it is seen that at least one person Sri. M.N. Krishnan, presently a Judge of the High Court who was junior to the second respondent in the cadre of Selection Grade District Judge was promoted as Super Time Scale District Judge. The Administrative Committee again considered

promotion to the cadre of Super Time Scale District Judges in their meeting held on 9.8.2004 produced as Ext.R1(f). It is seen from the said proceedings that while the second respondent was not considered again, the case of the third respondent was considered but his case was deferred. The Administrative Committee, without considering second respondent and after deferring the case of the third respondent, decided to promote seven persons named in Ext.R1(f), including the three petitioners herein, to the post of Super Time Scale District Judges. The decision of the Administrative Committee in Ext. R1(f) is implemented vide Ext.P4 order of the High Court dated 2.11.2004 which shows that petitioners stand promoted to the post of Super Time Scale District Judges with effect from the dates noted in paragraph one above.

4. Admittedly respondents 2 and 3 were not promoted as Super Time Scale District Judges either while issuing Ext.P3 or Ext.P4 because of the adverse remarks they had in their confidential reports. On going through the confidential reports furnished by the High Court which contain item-wise appraisal of the performance of the Judicial

Officer concerned by the High Court Judge in Administrative charge of the District, I find for second respondent, adverse confidential reports for two periods, one for the whole year from 1.1.2003 to 31.12.2003 and the other for the period from 1.1.2004 to 14.5.2004. For the first period while there were adverse remarks in two entries written by the Controlling Judge, the remarks under balance entries were also not positive in as much as the Judge has assessed his performance as "just satisfactory and average". So far as the second period is concerned, the only adverse remark was that his performance was not satisfactory. The adverse remarks were written by the controlling Judge for the first period on 24.3.2004 and for the second period on 14.5.2004. Review Petition filed by the second respondent against adverse remarks was considered by another Judge who expunged the adverse remarks vide proceedings dated 5.7.2005. So far as the third respondent is concerned, first adverse remarks in the confidential reports of the third respondent was written by the Controlling Judge for the period from 1.9.2003 to 31.12.2003 on 14.6.2004. In the rating given therein the Controlling Judge recorded performance in six items as satisfactory

and for the balance four items, he wrote adverse remarks. Even though third respondent filed application for Review of adverse remarks in confidential report, it was considered by the same Judge who wrote it and he rejected the application on 3.8.2004. For the following period from 1.1.2004 to 11.5.2004 also the Controlling Judge wrote adverse remarks a second time in the confidential reports of the third respondent on 16.9.2004. The third respondent filed Review Petition against this also which was allowed by another Judge on 1.6.2005.

5. It is obvious from Exts. P6, P8 and from the counter affidavit that the promotion of respondents 2 and 3 to the cadre of Super Time Scale District Judges was again considered by the High Court after the adverse remarks in their confidential reports were expunged on 5.7.2005 and 1.6.2005 respectively as stated above. Petitioners are not challenging the promotion given to respondents 2 and 3 to the cadre of Super Time Scale District Judges vide Ext.P6 dated 6.1.2006 and the challenge is limited to the retrospectivity given to the promotions overlooking the seniority, petitioners had over respondents 2 and 3 through their promotions vide Ext. P4 which was issued more than one

year before Ext.P6.

6. The short question to be considered is whether the retrospective promotion given to respondents 2 and 3 overlooking the seniority of petitioners is justified or not. The contention raised by respondents 2 and 3 is that they were not considered for promotion while petitioners were promoted to the cadre of Super Time Scale District Judges and the claims of respondents 2 and 3 were only deferred as is evident from Exts. R1(e), R1(f), P3 and P4 and that too only on account of adverse remarks in confidential reports. Therefore according to them, as and when adverse remarks are expunged from their Confidential Reports, they become eligible for promotion with retrospective effect because but for such adverse remarks they would have got promotion prior to the petitioners as they were admittedly seniors to petitioners in the cadre of Selection Grade District Judges. The case of the petitioners on the other hand is that what is made clear in Exts. R1(e) and R1(f) is that respondents 2 and 3 were considered for promotion along with others as and when their turn came and when those juniors to them in the cadre of Selection Grade District Judges

were promoted to the post of Super Time Scale District Judges, respondents 2 and 3 got superseded, because they were at that time found ineligible for promotion to the post of Super Time Scale District Judges, which was decided based on seniority-cum-merit of all the candidates considered. On going through Exts. R1(e) and R1(f) and the follow up orders issued vide Exts.P3 and P4, I am of the view that deferring the case of respondents 2 and 3 for consideration later does not itself mean that they were not considered for promotion along with others at that time. On the other hand, respondents 2 and 3 were in fact considered along with others and they were found ineligible for promotion at that time while those including the petitioners who were found fit for promotion to the cadre of Super Time Scale District Judges were in fact promoted. It is to be noted that Exts.P3 and P4 orders issued giving promotions to petitioners and others junior to respondents 2 and 3 were not provisional and were final orders and the consequences that followed including promotion of those juniors to respondents 2 and 3 as High Court Judges, are irreversible. No vacancy in the cadre of Super Time Scale District Judges was left

unfilled to provide for respondents 2 and 3 when Exts.P3 and P4 were issued. In fact it is clearly stated in Ext. R1(e) and R1(f) that even retired Judges were also considered for promotion to the higher cadre and some of them were denied it. The inference therefore is that though the case of respondents 2 and 3 were considered and they were found ineligible for promotion at that time, their cases were deferred obviously because being serving District Judges, they could improve their rating by subsequent performance and as and when vacancy arises in the higher cadre after they improve, their case for promotion will be considered. In other words, all that the Administrative Committee has decided was that respondents 2 and 3 were not permanently disqualified for promotion to the post of Super Time Scale District Judges. In the counter affidavit filed by the High Court about Ext.P6 it is stated in paragraph 14 that "the High Court considered their case with reference to their upto-date Confidential reports and it was resolved on 9.11.2005 to grant Super Time Scale to Sri. S. Sainudeen and Sri. M.L. Joseph Francis from the dates of their respective entitlement based on their seniority in the feeder category of

Selection Grade District Judges." What is clear from the above is that the decision to promote respondents 2 and 3 to the cadre of Super Time Scale District Judges vide Ext.P6 was taken on 9.11.2005 and the same was based on their confidential reports upto-date which not only includes the reports for 2003-2004 during which respondents 2 and 3 had adverse remarks in their confidential reports, though expunged later, but also confidential reports for balance period of 2004 and probably for part of the year 2005. The High Court obviously has not stated the date of entitlement for promotion for respondents 2 and 3. However, it is clear from the above statement that retrospectivity is given based on seniority in the cadre of Selection Grade District Judges which is a virtual reversal of Exts.P3 and P4 orders even though such orders were final and were not under review by the High Court. Since retrospectivity is specifically under challenge, the question to be considered is as to when and with effect from which date respodents 2 and 3 became eligible for promotion to the higher cadre of Super Time Scale District Judges in terms of Ext.P2 Rules. Since promotion given is only based on confidential report, this court has to consider effect of

review orders expunging adverse remarks entered in the service records of respondents 2 and 3 during 2003-2004. It is seen from the confidential reports of respondents 2 and 3 that their rating under various heads during the periods 2003-04 referred above was only "satisfactory and average". In fact it is pertinent to note that the Judges who expunged the adverse remarks from the confidential reports of respondents 2 and 3 have not made any substitution to the said adverse remarks and no rating is given in substitution of adverse assessments. In other words, even after expunging the adverse remarks from the confidential reports of respondents 2 and 3, rating of both of them remains "satisfactory or average" which cannot be equated to "merit" for the purpose of promotion to the cadre of Super Time Scale District Judges as contemplated under Ext.P2 order issued by the Government. Therefore, I am of the view that even after review of confidential reports, respondents 2 and 3 do not qualify for promotion to the post of Super Time Scale District Judges, if "merit" revealed from confidential reports for the periods in 2003-04 was the relevant criteria. Since the High Court has admitted that merit is assessed not by evaluation of

judgments, but by referring to confidential reports alone, respondents 2 and 3 were not qualified for promotion to the post of Super Time Scale District Judges neither when Exts. R1(e) and R1(f) decisions were taken nor after expunging adverse remarks from their confidential reports because even after adverse remarks were expunged from their confidential reports, the rest of the confidential reports do not disclose any merit in them. In this context, the decision of the Supreme Court in MIR GHULAM HUSSAN V. THE UNION OF INDIA, (1973) 4 SCC 135 cited by petitioners is squarely applicable to the facts of this case because the Supreme Court held that absence of adverse remarks is no criterion of the quality of an officer. Since after expunging adverse remarks from the Confidential Reports of respondents 2 and 3 the High Court Judges who reviewed the adverse reports did not make any substituted entry to improve such confidential reports during the said period for promotion based on the same, retrospective promotion given to them cannot be sustained by this court but could be upheld prospectively for more than one reason. In the first place, petitioners are not challenging the promotion given to respondents 2 and 3 to the

cadre of Super Time Scale District Judges. Secondly, since High Court has considered upto-date confidential reports of respondents 2 and 3 as on 9.11.2005, it has to be assumed that atleast for subsequent period respondents 2 and 3 would have got good reports in their confidential records and so much so, their promotions could be upheld prospectively and I do so. However, it is obvious from the above findings that respondents 2 and 3 were not eligible for promotion to the cadre of Super Time Scale District Judges when petitioners were promoted on the dates shown above. The Supreme Court has in the case of CHAIRMAN, RAILWAY BOARD V. C.R. RANGADHAMAIAH, (1997) 6 SCC 623, held that retrospectivity given to a rule can be challenged on the ground of violation of Articles 14 and 16 if the rule seeks to reverse from an anterior date the benefit which has been granted or availed, such as promotion, pay-scale, etc. Rule 6 of the Kerala State Higher Judicial Service Special Rules, 1961 provides that seniority of a person appointed either to category (1) or category (2) shall, unless he has been reduced to a lower rank as punishment, be determined with reference to the date of the order of his

first appointment to the said category. Even though the Rule is not amended to cover Super Time Scale District Judges, I do not think the principle can be different. Since petitioners were found eligible for promotion to the post of Super Time Scale District Judges and were in fact appointed earlier, they cannot be superseded by giving retrospective promotion to respondents 2 and 3 who became eligible for promotion only later. I am also constrained to observe that even though second respondent was superseded and his junior was promoted to the cadre of Super Time Scale District Judge vide Ext.P3 and he continuously remained superseded and got superseded by more juniors when Ext.P4 was issued, and third respondent was also superseded when petitioners got appointed as Super Time Scale District Judges with effect from the dates noted above, and respondents 2 and 3 continued as Selection Grade District Judges, juniors to petitioners and several others, they have not challenged Ext.P3 or Ext.P4 in this Court, nor did they demand any seniority over the petitioners and others who superseded them in the cadre of Super Time Scale District Judges even through a representation. Strangely the High Court before issuing

Ext.P6 superseding petitioners and others did not consider it fit to issue a proposal and hear the objections of petitioners and others adversely affected. The retrospective promotion and seniority granted to respondents 2 and 3 over petitioners and others obviously were not in the expectation of the beneficiaries because they have never claimed it by challenging Exts.P3 and P4.

7. Before parting with the matter I feel it is my duty to express my views on the procedure followed which led to this unpleasant litigation among senior level judicial officers against decisions taken by Judges of the High Court, though on the administrative side. It is clear from the facts disclosed in this case that adverse remarks written in the confidential report of District Judges by High Court Judges are reversed in a casual manner by other Judges succeeding to the administrative charge of the Districts without any new material which only shows that confidential report is not always based on any objective appreciation of performance of the District Judge but is only a matter of subjective opinion which obviously is a reflection of the personal relationship maintained by the District Judge with his

controlling Judge. Therefore, I am of the view that reliance on confidential reports alone for promotion to the cadre of Super Time Scale District Judge is absolutely unsafe because merit, the most relevant criteria for promotion under the Rules should be assessed based on judicial performance of the District Judge which will be reflected mainly in the judgments. In other words, merit is to be assessed based on qualitative and quantitative disposal of cases by the District Judge concerned which should be done by going through the judgments preferably by a few Judges and by looking at the volume of disposal of cases by a Judge. Even though Ext.P2 provides that upto 10% of the Selection Grade District Judges can be promoted to the cadre of Super Time Scale District Judges, it is not imperative that 10% should always be maintained if there is inadequacy of candidates with merit. In other words, what the Rule requires for promotion is consideration of relative merit among District Judges and seniority is to be maintained only among equals. Therefore, what is contemplated is not enbloc promotion to the cadre of Super Time Scale District Judges retaining the same seniority at the level of Selection Grade District

Judges just because candidates in the said list did not have adverse remarks in the confidential reports. If promotions are given as is done by the High Court based on seniority and qualification required that is "merit" is taken as want of adverse remarks in the confidential reports, then the same will defeat the object of Ext.P2 by mediocrity substituting excellence. Promotion to the cadre of Super Time Scale District Judge is essentially recognition of one's merit and if morale of the officers have to be maintained, the Rule has to be implemented objectively rewarding the eligible and rejecting the ineligible.

For the foregoing reasons, I hold that the retrospective promotion given to respondents 2 and 3 over the petitioners and others is arbitrary and violative of Article 14 of the Constitution of India, against Ext.P2 Rules and against the letter and spirit of previous decisions and orders issued by the High Court vide Exts. R1(e), R1(f), P3 and P4. In the circumstances, W.Ps. are allowed quashing Exts. P6 and P8 to the extent of granting retrospective promotion to respondents 2 and 3 in the cadre of Super Time Scale District Judges with direction to the High Court to issue fresh proceedings in the place of Ext.P6 granting

promotion to respondents 2 and 3 as Super Time Scale District Judges prospectively i.e., from 9.11.2005 and with consequential modifications in relation to all others concerned.

(C.N.RAMACHANDRAN NAIR)
Judge

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